

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 05 December 2005**

Case No. 2005-LHC-00953

OWCP No. 5-119621

*In the Matter of*

GLORIA J RAYNOR,  
*Claimant*

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,  
*Employer*

**Appearances:**

Charlene Parker Brown, Esq., for Claimant  
Jonathan Walker, Esq., for Employer

**Before:**

RICHARD E. HUDDLESTON  
Administrative Law Judge

**DECISION AND ORDER**

This proceeding involves a claim for temporary total disability from an injury alleged to have been suffered by Claimant, Gloria J. Raynor, covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (Hereinafter referred to as the "Act"). Claimant alleges that she was injured while carrying and installing tiles while employed by Employer, Newport News Shipbuilding and Dry Dock Co.; and that as a result she is suffering from back pain.

The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. A formal hearing was held on June 8, 2005. (TR at 1).<sup>1</sup> Claimant submitted five exhibits, identified as CX 1- CX 5, which were admitted without objection. (TR. at 7). Employer submitted ten exhibits, EX 1 through EX 10, which were admitted without objection. (TR. at 9, 56). The record was held open until August 9, 2005 for the submission of post-hearing briefs. After an order granting extension of time for submission of briefs was entered on August 31, 2005, Claimant submitted her brief on September 12, 2005 and Employer submitted its brief on September 14, 2005.

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<sup>1</sup> EX - Employer's exhibit; CX- Claimant's exhibit; and TR – Transcript.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

## **ISSUES**

The sole issue in dispute between the parties is whether Claimant suffered a compensable injury on September 20, 2004.

## **STIPULATIONS**

At the hearing, Claimant and Employer stipulated that:

1. An employer/employee relationship existed at all relevant times;
2. The parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act;
3. A timely notice of injury was given by the employee to the employer;
4. A timely claim for compensation was filed by the employee;
5. The employer filed a timely First Report of Injury with the Department of Labor and a timely Notice of Controversion;
6. The employer provided the claimant with medical services as required by 33 U.S.C. 907 (1994);
7. The issue to be resolved is whether Ms. Raynor suffered a compensable injury on September 20, 2004;
8. If found compensable for the September 20, 2004 injury, the Employer is responsible for temporary total disability benefits from October 13, 2004 to November 20, 2004 minus any credit for short term disability benefits;
9. Ms. Raynor's average weekly wage at the time of the injury is \$463.56 with a corresponding compensation rate of \$309.74.<sup>2</sup>

## **DISCUSSION OF LAW AND FACTS**

### *Testimony of Claimant*

Claimant testified that, as of the time of the hearing, she had been employed by Employer for approximately four and a half years. (TR. at 12). Claimant explained that though she was

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<sup>2</sup> JX 1.

hired in as a brush painter, her actual job has been installing tiles. (TR. at 12). Claimant described her job duties:

Sometimes we have to paint or we have to fit – get the tiles and take it on the boat, fit it up and make sure it fits.

(TR. at 13). Claimant described the tiles as “heavy,” and noted that she usually worked with a “mate,” a fellow employee, when performing this task. (TR. at 13).

Claimant testified that she began work on September 20, 2004, at 7 am. (TR. at 14). Claimant noted that she was not having any pain in her back when she awoke that morning. (TR. at 28). Claimant described her events that morning:

We usually have like a 10 or 15 minute meeting in the morning and our jobs are assigned to us. And what we have to do is get the tools that we’re going to need and then we go get the material that we’re going to need, as far as the tiles we pick up.

(TR. at 14). Claimant noted that she was assigned to work on a submarine on September 20. (TR. at 14). Claimant further noted that her assigned “mate” for the day worked with the Safety Task Team. (TR. at 15). As a result, Claimant testified that her “mate” was in and out of work and only assisted her for part of the time. (TR. at 16). Claimant testified that she was mainly left alone to carry the tile by herself. (TR. at 16).

Claimant testified that each tile had a different weight, but approximated that the average weight of a tile was “maybe a pound.” (TR. at 16). Claimant explained that the tiles came in all different sizes:

You have like 12 by 12, 8 by 12, 9 by 12, 6 by 12, all the way down to 3 by 2s. So they are all different sizes.

(TR. at 17). Claimant testified that she was carrying two to three pieces of tile at a time, of all different sizes, on the date of her alleged injury. (TR. at 17).

Once Claimant picked up the tile, she explained that she had to carry it up an approximately 8-foot ladder to the staging area. (TR. at 17). From there, Claimant said that she had to carry the tile to the area in which she was assigned to work, which involved more climbing. (TR. at 17). Claimant estimated that it took her “six or seven” trips to get all of the tile where she needed it. (TR. at 18). Claimant recalled that her back started hurting when she was taking the tile up the ladder. Claimant explained:

When I would bend down to pick up a couple of pieces, I felt my back – my back was beginning to hurt. And after I got it all up that’s when I decided to take the medication.

(TR. at 21). Claimant was ask to specify what precisely she was doing when she first felt pain in her lower back, to which she responded, “I was bending down to pick up the tiles and going up the ladder.” (TR. at 41). Claimant described the pain as “an aching the lower part of [her] back like [she] pulled something.” (TR. at 41). At a different point in her testimony, Claimant was asked when she initially felt the back pain, to which she responded:

I was putting in the tile. You have to hold the tile up and put the washer on with one hand and screw it with the other one. But it was like over my head – well, you know, not overhead, but up high where I had to reach up. And then each time I get a piece of tile I would have to bend down to pick it up and go back into the area and hold it up and do it again.

(TR. at 20).

Claimant testified that she took the pain medication Vicodin for her back pain. (TR. at 41). Claimant originally stated that she received a prescription for Vicodin on September 20, 2004, but later clarified that the pills she took were left over from her neck surgery. (TR. at 42). Though Claimant noted that she generally kept this medicine in her home, she had it with her at work because:

It was some that was in there from a period of time – it was some where I just always put it in there because sometimes I took it for my headaches or – I get migraine headaches, so I took it for my headaches. And on occasion I had a bottle that I would keep Excedrin and those in there. If the Excedrin didn’t work, I would take Vicodin.

(TR. at 44). Claimant later testified that this Vicodin was prescribed for the back pain she endured while out of work for her neck surgery.<sup>3</sup> (TR. at 46).

Claimant testified in more detail concerning her September 11, 2002, neck surgery. Claimant initially noted that she returned to full duty employment following this on August 5, 2004. (TR. at 21). When asked if she ever had problems with her lower back, Claimant responded:

When I was out with the surgery for my neck, by me not being able to move around and gaining a lot of weight, it caused pressure on my back. So my doctor recommended losing weight and seeking pain management.

(TR. at 22). When pressed, Claimant answered affirmatively that she had previous problems with her lower back. (TR. at 22). Claimant explained, “It was like just through the time I was out of work, that’s when my back was hurting.” (TR. at 44). Claimant also noted that she had pain radiating down her right leg. (TR. at 51). Claimant was treated by a pain management specialist, and noted that she had lost the recommended weight. (TR. at 23). Claimant testified

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<sup>3</sup> There is no evidence in the record that indicates that Claimant’s neck surgery was work related and Claimant does not appear to argue that her alleged back pain on September 20, 2004, resulted from an aggravation of a previous injury.

that she previously took Vicodin for back pain until July 31, 2004, the date she was released for work from her neck injury:

I went back to Dr. Doss because I told him that my back had gotten better – it was better and I didn't need to take the medication. And that's when he gave me my report saying that I could return to work. He had to also sign off for me to return to work.

(TR. at 47). Claimant testified that she did not take Vicodin again for back pain until September 20, 2004, the date of this alleged incident. (TR. at 47). Claimant noted that she was released to work, and her pain management specialist told her she was "fine." (TR. at 23).

Claimant testified that though her lower back previously pained her while she had been out of work for her neck surgery, it was different from her injury that is the subject of the present case:

The difference was, the back pain from being out of work was pressing down the middle of my back. The back pain from the sprain was on the [right] side.

(TR. at 45).

Claimant testified that she continued working on September 20, 2004 despite the back pain. (TR. at 21). After a short break, Claimant testified that she had to tape the tile. (TR. at 18). Claimant explained that she was responsible on the date of the alleged injury of getting the tiles "pre-hung" to make sure they fit. (TR. at 13). Claimant explained the meaning of "pre-hung":

We have to hang it to make sure every piece is going to fit so we know whether we have to cut it or not, or make sure it's not too close to a wall so everything will fit.

(TR. at 14). Claimant testified that her "mate" helped her tape the tile, and then she began pre-hanging the tile by herself. Claimant described the process:

You have to put the tile on the studs that's attached to the bulkheads and attach it with temporary washers.

(TR. at 19). Claimant testified she was not working overhead in completing this task. Rather, she described the location as:

It was like facing me but it was in – some of the area was tight. You had to get in-between like the wires. You know, the wires that was put in the holding stage, you had to work in-between those.

(TR. at 19). Claimant noted that she completed the majority of this work. (TR. at 19).

Claimant testified that upon completion of her work day, she went home and took some more pain medication. When that was not effective in easing her pain, she went that night to the Riverside Emergency Room. (TR. at 24). Claimant testified to her motivations for going to the emergency room:

Because I had taken some more pain medication when I got home because my back was beginning to aggravate again and I wanted to take the medicine before it got worse. And even though I took it, it didn't help.

And I got out of bed at eleven o'clock and went to the emergency room, and I think I left the emergency room at four o'clock in the morning.

(TR. at 67-8). Claimant recalled that she was told at the emergency room that she "could go to work, but [she] just had a pulled muscle." (TR. at 24). Claimant testified that she informed the emergency room doctor that she had been lifting tiles at work that day. (TR. at 32). Claimant noted, however, that the emergency room notes that she gave to Employer do not record that she had alleged that she had injured herself lifting tiles. (TR. at 32).

During her testimony, Claimant was asked why her emergency room records recorded that "Patient states a gradual onset of symptoms." (TR. at 35). Claimant initially stated she did not recall saying this to the emergency room attendant, but then explained:

Okay. To explain – onset was two months ago – this was before I came back to work and – from the injury for my neck. But the injury for my back wasn't – it was different injury with my back when I was out of work than it was for this. So it is not the same back injury.

(TR. at 35).

Claimant testified she did not report her injury to her supervisors on the date that it occurred. (TR. at 23). However, Claimant said that she reported it on September 21, 2004, the following day. (TR. at 23). Claimant states that she informed Julie Clark, the make-up supervisor. (TR. at 24). Her regular supervisor, Larry Davis, was working as General Foreman on that date. (TR. at 24). Claimant noted that she gave her emergency room paperwork to Ms. Clark, and returned to work. (TR. at 25). However, Claimant clarified later that she didn't actually provide the emergency room records, but rather just a note stating that she had been seen in the emergency room, and was fit to return to work. (TR. at 36).

Claimant testified that she consulted Dr. Adcock, her family doctor, on October 1. Claimant explained:

Because I wasn't feeling any better. And the emergency room doctor said if I wasn't feeling better to go see my regular doctor.

(TR. at 65). Claimant was kept out of work for three days following this visit, and returned to work on October 4, 2004. (TR. at 66). When Claimant returned to work on October 4, Claimant testified that she presented an out-of-work note to both her supervisor and the clinic. (TR. at 66).

Claimant testified that she reported her injury to Employer's clinic on October 4, 2004. (TR. at 25). Claimant testified that she also reported it to Mr. Davis on that date. (TR. at 25). Claimant "told him that [her] back was hurting and [she] needed to go to the clinic." (TR. at 25). Claimant recalled that Mr. Davis filled out an accident report. (TR. at 26).

Claimant testified that after she went to the clinic on October 4, she was placed on light duty. (TR. at 26). Claimant testified that she nevertheless felt capable of returning to full duty on this date. (TR. at 30). Claimant worked light duty until she returned to the clinic on October 13. (TR. at 26). Claimant described the events of October 13:

When I went back to the clinic for a revisit that's when the – the doctor – the doctor's assistant told me that he changed it to personal and he passed me out [of work] for it. And when he called to see if they had any work for me with those restrictions they said no and I was sent home.

(TR. at 27). Claimant testified that she was willing, and felt able, to work on October 13. Claimant further noted that she had been cleared to work by a doctor, but had been "passed out by the physician's assistant." (TR. at 27). Claimant testified that she remained out of work until November 2, 2004. (TR. at 27).

Claimant testified that she had informed the physician's assistant that she had never had back pain prior to September 20, 2004. (TR. at 39). However, Claimant agreed on cross that her treating physician for her neck injury, Dr. Carlson, told her she had some arthritis in her lower back. Additionally, Claimant complained of continued back pain to Dr. Carlson, which he opined was "normal with the surgery that [she] had." (TR. at 40). Claimant explained on redirect that she neglected to inform the physician's assistant of this because her original lower back pain "wasn't an injury, it was just due to the fact that [she] had gained weight." (TR. at 49). Claimant explained the difference:

Because once I had lost the weight the pain went away. And like I said, it – it was in the middle of my back. And the difference is it was like an aching and this was like a pulling pain. So it was two different types of pain.

(TR. at 50).

Claimant testified that she underwent a functional capacity evaluation on November 2, 2004, at the request of the physician assistant. (TR. at 27). Claimant testified that she returned to work under this functional capacity examination. (TR. at 28).

Claimant testified that she felt that the work she performed on September 20, 2004 caused her back pain. (TR. at 29). Claimant explained:

Because I was constantly picking up tiles, taking it from one stage to another and you know, several times. And the area that I was working in, you had to do a lot of twisting and turning and a lot of reaching up, and I think that's what caused it.

(TR. at 29). Claimant testified on cross that she did not reach this conclusion that her back pain was work related until October 4, 2004. (TR. at 31). Claimant explained her reasoning:

Because my job had changed within that time because we don't do the same thing every day. And then the job that I had following that wasn't as strenuous as what I was doing before.

(TR. at 31). Claimant additionally explained:

Because I wasn't hurting the day before or any other time. And because of the job I was doing, that's when my back started hurting when I was doing the job.

(TR. at 32).

#### *Testimony of Larry Davis*

Mr. Davis has been a supervisor for Employer since 1978. (TR. at 55). Mr. Davis recalled that a make-up supervisor was working in his place on September 21, 2004. Mr. Davis described this position:

As they say, they take the foreman's place if they are sick or functioning in some other capacity.

(TR. at 56). Mr. Davis noted that make-up supervisors receive training in both the classroom and in the yard, and foremen also train them on their responsibilities. (TR. at 57). Mr. Davis also noted that make-up supervisors receive training on what to do when an employee reports an injury:

I'm not sure if they have any formal classroom training. If it's a reportable injury and the person is requesting to go seek medication or to the clinic, they are told to do that.

(TR. at 57).

Mr. Davis testified that Claimant reported her back problems to him on October 4, 2004. (TR. at 57). Mr. Davis drafted a Supervisor's Incident Report<sup>4</sup>, which he described:

[W]hen we have injuries we have to fill out an official report for our company and for our safety engineers to do an investigation in the yard so we can identify the problems and eliminate them.

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<sup>4</sup> There is no evidence of a Supervisor's incident report in the record dated September 21, 2004, when Claimant allegedly informed the make-up supervisor of her injury.



(TR. at 60-1). Mr. Davis recalled that Claimant informed him that she thought she injured herself carrying tiles. (TR. at 63).

Mr. Davis testified that he did not recall making any inquiry with Claimant's make-up supervisor as to whether Claimant reported her injuries on September 21. (TR. at 62).

*Testimony of Carl Wright*

Mr. Wright is a certified physician's assistant employed by NOWCare Physicians. (TR. at 70-1). Mr. Wright testified that he was at the shipyard clinic practicing as a physician's assistant:

Through my employer I'm contracted out. I work with several different practices. My main practice is with NOWCare which is occupational, medical, and urgent care. And then I get contracted out to the shipyard where I work at the shipyard clinic on many occasions.

(TR. at 72). Mr. Wright described his responsibilities at the shipyard clinic:

Anything from doing the physicals, maintenance physicals, evaluations, to working downstairs in the clinic seeing patients and treating patients.

(TR. at 72). Mr. Wright testified that he is licensed to write prescriptions. (TR. at 72).

Mr. Wright testified that he evaluated Claimant on October 4, 2004. (TR. at 72). Mr. Wright was asked to read the notes of Richard Hull, the nurse who triaged Claimant on this date:

That [Claimant] returned to the clinic. She went to see her doctor and took herself to the emergency room on the 20<sup>th</sup>, '04, at about 23 – at about eleven o'clock at night. Was diagnosed with back strain and given a prescription, and at the same time, some type of injection. Contact – contact supervisor and question whether it is a work-related injury. [Claimant] says that back pain is work related; that she was carrying tiles up and down the ladders on the date of the 20<sup>th</sup> and started feeling pain around 10 a.m. that morning. Stated the pain would come and go but it got worse later that night at home and went to the ER for treatment.

(TR. at 74). Mr. Wright testified that he evaluated Claimant subject to the triage. (TR. at 74). Mr. Wright recounted Claimant's history he received from her that day:

That she was returning to work from back pain; that she was taking Vicodin; hurt her back on the 20<sup>th</sup>; and went to the emergency room and came back to work on the 21<sup>st</sup>. Then went back to her own doctor on the 1<sup>st</sup> of October. States that she was still taking Vicodin, now, and had been for the pain. Says that she was lifting 10 to 15 pound [tiles] and pain was intermittent.

(TR. at 74).

Mr. Wright described his examination of Claimant:

I did an exam on her and, you know, I checked out all of her symptoms. She had full range of motion in her back; she had good strength; she had all normal neuro-functions; all her reflexes were intact. And my disposition was that she had a back strain.

There was some question as to whether this was a work-related injury from her supervisor. I wrote that it was a lumbar strain, questionable etiology, and at this time I put it as personal, but then, you know, it's going to be under investigation.

(TR. at 75). Mr. Wright explained the phrase in his note "Etiology does not coincide with work injury at this time":

That she had a back strain; don't know where the origin of it is coming from, and at this time I'm not sure if it's a work-related injury so it's going to be under investigation.

(TR. at 76).

Mr. Wright testified that he developed the following plan of action for Claimant upon conclusion of the examination:

To put her on restrictions; no lifting over 20 pounds, no ladders, and follow up with her regular doctor to get a – find out what is going on.

(TR. at 77).

Mr. Wright testified that he once again evaluated Claimant on October 13, 2004. (TR. at 77). Mr. Wright read his notes regarding this visit into the record:

Patient presented with chief complaint of lower back pain. Patient has not been seen by her private doctor yet. Not as neck pain, not as reticular symptoms, and stated she did not have pain yesterday; started – started hurting again today.

And then the objective is that patient has full range of motion, five out of five strength, normal heel to toe, normal straight leg raise, tender to palpation, left lumbar paraspinal.

While patient was bending, stated having dizzy symptoms. Low back pain may be personal.

(TR. at 77). Mr. Wright noted that Claimant complained of general back pain during her initial visit, but described pain on the left side on the October 13 visit. (TR. at 78). Mr. Wright noted

that he opined on October 13 that Claimant's pain from October 4 "had resolved." (TR. at 78). Mr. Wright explained that Claimant's dizziness, disequilibrium, was not related to her back problems. (TR. at 80). Mr. Wright testified that he had passed Claimant out of work for both her back pain and her disequilibrium. (TR. at 80).

Mr. Wright testified that he had additional office notes dated October 13:

Where I called – there was some question with her disequilibrium as to what was going on, and I called the physical therapist that she was working with, and talked with Dr. Adock. Patient was complaining of being dizzy, had some pain issues, and reported that the patient had an H and P – that's a herniated disk in her lower back. Had an MRI and I advised them that the clinic – [Claimant states that] her current back strain is work related.

(TR. at 81-2).

Mr. Wright testified that he again saw Claimant on October 14, 2004:

Then I saw her back on the 14<sup>th</sup> where she states she has never hurt her back before. She never had pain before her injury on the 20<sup>th</sup> of September, '04. Patient states that she's not having any problems with her back today.

(TR. at 82). Mr. Wright noted that he performed an evaluation, which found, "[Claimant] had a full range of motion, everything was intact, normal function, tender to palpitation." (TR. at 82). Mr. Wright's assessment was as follows:

That apparently she had a C-spine fusion by one of her notes. Had back strain which has resolved. She still has disequilibrium. We did not resolve that issue yet. And return to work with restrictions from her personal doctor.

(TR. at 83). Claimant's restrictions were described as, "No lifting over 25 pounds, no repetitive bending or no working with ladders, and occasional overhead work only [. . .]" (TR. at 83).

Mr. Wright testified that it was in response to his questioning that Claimant informed him that she had never previously hurt her back. (TR. at 84). Mr. Wright clarified that he asked Claimant both if she had ever previously hurt her back, and if she had ever previously suffered from back pain. (TR. at 84). According to Mr. Wright, Claimant answered in the negative to both of these inquiries. (TR. at 84).

Mr. Wright explained his position of why he felt that Claimant's back injury was not work related:

From the statement - the questions of work – the supervisor questioning whether it was a work-related injury; whether or not there was no specific injury from the history, she didn't recall a specific injury of when her back started hurting.

It was intermittent. At one point there was no pain and then it just starting aching later on.

(TR. at 89).

### Medical Records

#### *Records of Dr. Jeffrey R. Carlson*

Dr. Carlson is a member of Orthopedic Surgery and Sports Medicine Specialists, and performed Claimant's neck surgery on September 20, 2002. (EX 1). Dr. Carlson's notes dated June 13, 2003 state:

[Claimant] is being seen for lower back pain. She comes today saying she continues to have significant lower back pain that is quite troublesome to her. She had the MRI scan of the lumbar spine and comes today for evaluation. She says it is difficult for her to get up and down because of the pain she is having in her back.

(EX 1). Review of the MRI scan revealed "mild disk protrusion at L1-2 and some mild arthritic changes." (EX 1). Dr. Carlson rendered the following impression:

[Claimant] has some mild arthritic changes throughout the lumbar spine and continued lower back pain. At this point, I would like to get her started with a physiatrist for long-term management of her pain and physical therapy exercises.

(EX 1). Claimant continued to complain of back pain during her January 8, 2004 visit with Dr. Carlson. (EX 1-3).

#### *Records of Dr. William Doss*

On January 20, 2004, Claimant's chief complaint was listed as "low back pain with radiation down the right leg." (EX 7). Claimant's history on this date was recorded as:

[Claimant] is a very pleasant 45-year-old black female, whom I last saw back on December 18, 2003. At that time we noted that she had some chronic low back pain with acute exacerbation radiating down her right leg. We had given her a shot of Troadol, which she says really did not help her. We also put her on some Percocet and increased it up to 2 tabs q.6h., instead of 2 tabs q.8h. This really did not help her either. She comes in today for a follow-up visit.

(EX 7). Claimant's physical examination revealed a pain level of 10/10, and the motor exam revealed 5/5 strength in both the upper and lower extremities. (EX 7).

Dr. Doss rendered the following assessment and plan:

ASSESSMENT:

1. Left sacroiliac joint dysfunction, status post Kenalog injection.
2. Chronic low back pain radiating down the right leg.

PLAN:

1. I would like to go ahead and set up [Claimant] for an EMG of her left lower extremities.
2. In addition, I will increase her Percocet to 10/325 mg 2 tabs q.6h.
3. I would like to see [Claimant] back in the office in 3 weeks for her EMG appointment.

(EX 7).

Claimant once again consulted Dr. Doss on February 19, 2004, with the chief complaint of “[l]ower back pain with radiation down the right leg.” (EX 7-2). Claimant underwent a nerve conduction study, which yielded “normal” results. (EX 7-2). Claimant additionally underwent an EMG, which yielded a “[n]ormal EMG of right lower extremity as well [ . . . ] right lower back.” (EX 7-2). Dr. Doss rendered the following clinical interpretation:

1. A normal study.
2. No Electrodiagnostic evidence of right lumbosacral radiculopathy noted at this time.

(EX 7-2).

Claimant was still complaining of “[l]ower back pain with radiation down the right leg” when she consulted Dr. Doss on March 18, 2004. (EX 7-3). Dr. Doss renewed Claimant’s Percocet prescription, and requested to see her again in two months. (EX 7-3).

Claimant informed Dr. Doss on June 17, 2004, that the Percocet had not been effective in preventing her back pain. (EX 7-4). After a physical examination, Dr. Doss developed the following plan:

1. We will go ahead and switch [Claimant] around. We will place her on some Avinza. She will do 60 mg tablets.
2. In addition, we will give her Percocet 7.5/325 mg q.6h for breakthrough pain.
3. I would like to see [Claimant] back in one month’s time.

(EX 7-4).

Claimant once again consulted Dr. Doss on June 30, 2004. He recorded her history as follows:

[Claimant] is a very pleasant 45-year-old black female, whom I last saw back on June 17, 2004. At that time we had put her on some Avinza and Percocet. **Since**

**that time she says the Avinza and Percocet have not been helping her. She has been in severe pain.** She comes in today for a follow-up visit.

(EX 7-5) (emphasis added).

Upon conclusion of the June 30 evaluation, Dr. Doss rendered the following assessment: “Chronic low back pain with acute exacerbation.” (EX 7-5). Dr. Doss developed the following plan:

1. I have gone ahead and written [Claimant’s] prescription for: OxyContin 40 mg q.8h; OxyIR 5 mg 2 tabs q.8h.
2. **We will hold these for her and have her bring in the remaining Avinza that she has left as well as the Percocet so we can dispose of those.**
3. I have told her, that because she is in a lot of pain, to go ahead and double up on her Avinza today.
4. I would like to see [Claimant] back at her next scheduled appointment.

(EX 7-5) (Emphasis in original).

Claimant consulted Dr. Doss for the last time of record on July 31, 2004. Claimant informed Dr. Doss that the OxyContin had not eased her back pain. (EX. 706). After a physical examination, Dr. Doss rendered the following plan:

1. We will go ahead and take [Claimant] off of the Oxycotin. She was having to take 2 every 8 hours and still not getting any relief. We will go ahead and switch her over to the MS Contin to the equal analgesic dose, which will be 100 mg p.o. q.12h.
2. In addition, we put her on MSIR 30 mg q.6h.
3. She also would like to see if she can try to go back to work. I am all for that, and I have written her permission to go back to work, and we will see how she does with it.
4. I would like to see [Claimant] back in 1 months time.

(EX 7-6).

*Riverside Regional Emergency Room Records*

The records indicate that Claimant sought care in the emergency room on September 21, 2004. (EX 4). The chief complaint was listed as: “Patient presents to the ED with history of left, back pain.” (EX 4). Additionally, it was noted that there was

TIME COURES: No apparent mechanism of injury. Patient states a gradual onset of symptoms. According to patient onset was 2 MONTHS AGO, Complaint is intermittent.

LOCATION: Pain most severe in lower back, radiation is none.

QUALITY: Sharp.

ASSOCIATE WITH: No numbness, motor weakness is present, no bowel incontinence, no bladder incontinence, Able to void, No abdominal pain, No fever, No sciatica, No tingling, No Dysuria.

SEVERITY: Patient states maximum severity is severe, currently symptoms are moderate.

EXACERBATED BY: Patient's condition exacerbated by movement, walking.

RELIEVED BY: Patient's condition relieved by remaining still.

(EX 4).

The physician's physical examination of Claimant was described as normal, and Claimant was discharged.(EX 4). Claimant received discharge instructions which urged her to increase potassium as prescribed by her family doctor, follow up with her family doctor in one to two days. Claimant was also prescribed Percocet. (EX 4).

*Riverside Mercury West (Dr. Adock)*

It appears that Claimant sought treatment from Dr. Adock's office on October 1, 2004. An x-ray interpretation associated with this visit reads:

L/S Spine: Minimal degenerative change several levels. There appears to be a small calcification in the mid pole of the left kidney.

Impression: Minimal degenerative change of the L/S spine. Possible small calculus mid pole of the left kidney.

(CX 6).

The record also contains several work excuses on behalf of Claimant signed by Janice Porter, RN NP. It appears that Ms. Porter works with Dr. Adock. Claimant received the following work excuse dated October 1, 2004:

[Claimant] was seen here on 10/01/2004.

Please release this person from work beginning 10/01/2004. She can return on 10/04/2004.

(CX 2-3).

Claimant received the following work excuse dated October 14, 2004:

[Claimant] was seen here on 10/14/2004.

Comments: [Claimant] may return to work without restrictions. Still needs to get FCE as scheduled.

(CX 2-1). An additional note dated October 14, 2004 relayed the following restrictions:

[Claimant] may return to work with the following restrictions:

Limit lif[t]ing to no more than 25 lbs. No repetitive bend forward. No working at heights or vertical ladder climbing.

For the period beginning 10/14/04 and ending 11/08/2004.

Comments: low back pain.

(CX 2-2).

A work excuse dated November 16, 2004 stated that Claimant should “return to regular duty without any restrictions starting 11/1/04.” (CX 6).

## ***Analysis***

### **Section 20(a) Presumption**

Section 20(a) of the Act provides a claimant with a presumption that her condition is causally related to her employment if she shows that she suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff’d*, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989). Once a claimant has invoked the presumption, the burden of proof shifts to employer to rebut it with substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 196 U.S. 280 (1935).

### ***Claimant’s Prima Facie Case***

In order to establish her *prima facie* case, a claimant has the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm. *See, e.g., Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Kelaita Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).<sup>5</sup> If these two elements are established, a claimant is entitled to a presumption that her injury is work-related. 33 U.S.C. §920(a); *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

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<sup>5</sup> The term “burden of proof” encompasses two separate burdens. The first is the burden of going forward with the evidence. In order to meet this burden, claimant must produce evidence, satisfactory to the judge, that a particular fact in issue exists. The second burden is the burden of persuasion, which consists of persuading the trier of fact that the alleged fact is true. Thus, Claimant’s satisfaction of the ultimate burden of proof on a particular issue consists of meeting both the burden of going forward with the evidence and the burden of persuasion. *Jones v. J.F. Shea Company, Inc.*, 14 BRBS 207 (1981).



Under Section 556(d) of the APA, the claimant bears the ultimate burden of persuasion by a preponderance of the evidence. *See* 5 U.S.C. § 556(d). *Director, OWCP v. Greenwich Collieries, (Maher Terminals)*, 512 U.S. 267 (1994). Therefore, Claimant must establish each element of her *prima facie* claim by a preponderance of the evidence. The presumption in Section 20(a) of the Act is not available to aid Claimant in establishing either the existence of the harm or the fact that an accident occurred or that working conditions existed that could have caused the harm. *Kelaita*, 13 BRBS 326 (1981).

As to the first element, a claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the Section 20(a) presumption. *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359 (5th Cir. 1982).

In the instant case, Claimant argues that her testimony detailing her back pain is sufficient to establish the physical harm element. For the reasons set out below, I have found that the Claimant's testimony in this case is not credible. Therefore, her testimony that she suffered back pain on September 20, 2004 at work, standing alone, would not be sufficient to establish by a preponderance of the evidence that she suffered a harm. However, even assuming that she did feel back pain on that date, the Claimant has not established that an accident occurred or that working conditions existed which could have caused, aggravated, or accelerated any back problems she may have.

To reiterate, as under the harm element, the presumption contained in Section 20 does not aid a claimant in establishing the second element of her *prima facie* case. *Kelaita*, 13 BRBS 326 (1981); *see also Sharp v. Marine Corps Exchange*, 11 BRBS 197 (1979), *Mock v. Newport News Shipbuilding and Dry Dock Co.*, 14 BRBS 275 (1981); *Jones*, 14 BRBS 207, *Graham v. Newport News Shipbuilding and Dry Dock Co.*, 13 BRBS 336 (1981). Underscoring this second requirement, the Supreme Court noted that a claimant must show more than "[t]he mere existence of a physical impairment." *U.S. Industries v. Director, OWCP*, 455 U.S. 608, 615 (1982).

As to the second element of her *prima facie* case, Claimant argues that:

There is no question in the present case that [Claimant] proved that work related conditions existed causing physical harm to her lower back pain. [Claimant] credibly testified that on September 20, 2004 she was carrying tiles back and forth on the submarine tank when she noticed that her back [began] to hurt. [Claimant] described the process, which involved a great deal of climbing and bending. [Claimant] further described the physical process carrying the tiles, attempting to pre-hang the tiles, and the constant bending – all physical activities which she testified hurt her back.

(Claimant's Brief at 9).

In order to successfully invoke the section 20(a) presumption, Claimant must demonstrate the existence of an accident or working conditions **that could have caused her injury**. *United States Industries/Federal Sheet Metal*, 455 U.S. at 615; *Kelaita*, 13 BRBS at 331 (emphasis added).

A claimant's testimony, if credible, in the absence of any evidence to the contrary, can be sufficient to carry her burden of proof. However, I find that the Claimant's testimony is not credible.

To begin, Claimant's own statements regarding a specific accident occurring at work that could have caused her back pain are inconsistent. Notably, Claimant was asked to specify what precisely she was doing when she first felt pain in her lower back, to which she responded, "I was bending down to pick up the tiles and going up the ladder." (TR. at 41). However, earlier in her testimony, Claimant identified a different initial onset of pain when she responded to a question regarding the time at which her back began to hurt:

I was putting in the tile. You have to hold the tile up and put the washer on with one hand and screw it with the other one. But it was like over my head – well, you know, not overhead, but up high where I had to reach up. And then each time I get a piece of tile I would have to bend down to pick it up and go back into the area and hold it up and do it again.

(TR. at 20). Claimant's recollection of the events is even more questionable due to the fact that she failed to make any connection between her work and her alleged back pain until October 4 – more than two weeks after the pain allegedly occurred. (TR. at 31.) This delay in realization supports a finding that no accident occurred during the course of Claimant's employment.

Additionally, there is affirmative evidence in the record that Claimant gave statements prior to the hearing that greatly differed from those she gave at the hearing regarding where, how, and/or how many times she injured her back. The record indicates that she informed the emergency room physician on the date of the injury that she had suffered from intermittent back pain for the previous two months. (EX 4). However, she informed Employer's clinic that she had never previously suffered from back pain prior to September 20, 2004. (TR. at 82). At the hearing she testified that she had suffered from previous back pain, but that it had ended on July 31, 2004. (TR. at 47). Even this assertion is contradicted by Claimant's medical records dated July 31, 2004, which clearly indicate Claimant was suffering from such severe back pain that Dr. Doss changed her prescription for pain medication from to MS Contin. (EX 7-6).

Further, the record contains no evidence that the Claimant reported an accident or incident on September 20, 2004, or that any other individual witnessed the events described by the Claimant.

Upon consideration of the record, including the Claimant's hearing testimony, I do not find her testimony to be credible. As the only evidence of record to support a finding that an "accident" occurred at work is the Claimant's testimony, I find that Claimant has failed to establish that an accident occurred at work that could have caused, aggravated or accelerated her back pain.

Claimant has also failed to establish that general working conditions existed that could have caused her back pain. While the Claimant may have experienced back pain at some point at work, since she had an ongoing personal back problem, the Claimant has failed to establish by a preponderance of the evidence that working conditions existed that could have caused, aggravated or accelerated this pain. The Claimant's testimony that she was in fact carrying and installing tiles on the date in question is undisputed in the record. Indeed, it is not disputed that she engaged in some bending and climbing. However, this evidence alone, as detailed only by Claimant's dubious testimony is insufficient to prove by a preponderance of the evidence that these activities could have caused her back pain.

A claimant is not required at this point to introduce affirmative medical evidence establishing that working conditions **actually** caused a harm in order to invoke the Section 20(a) presumption. However, a claimant must show the existence of working conditions that could have conceivably caused alleged harm beyond a "mere fancy or wisp of 'what might have been.'" *Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968). The record before me also does not contain any medical evidence that Claimant's working conditions **could have** caused, aggravated or accelerated her pre-existing back pain.

Having noted the many inconsistencies in Claimant's account, it becomes difficult to believe Claimant's allegations that her working conditions could have caused her back pain. Although Claimant need not show a precise causal connection at this point of the juncture, she must demonstrate that the conditions she was exposed to could have caused her alleged injury. The only evidence of Claimant's working conditions is Claimant's own testimony. According to this testimony, on the date in question, Claimant carried two to three tiles at a time, each weighing approximately one pound, up an eight foot ladder, approximately six to seven times in total. Claimant also "pre-hung" these one pound tiles, working on the wall in front of her, as opposed to overhead. (TR. 14, 17-18). However, there is no other evidence or testimony in the record that indicates these activities could have caused Claimant's back pain. The fact that Claimant may have suffered back pain at work is not in and of itself sufficient to establish that Claimant's working conditions could have caused such pain. As such, I find the evidence insufficient to establish with any degree of certainty that working conditions existed which could have caused Claimant's alleged "harm."<sup>6</sup>

The facts in the record make clear that Claimant had a history of pre-existing intermittent back pain, unrelated to her work. Claimant has failed to establish that a work-related accident occurred or that working conditions existed that could have caused, aggravated or accelerated any back pain she may have felt on September 20, 2004. Without sufficiently demonstrating either, Claimant's *prima facie* case fails, the presumption of Section 20(a) is not invoked, and the claim must be denied.

In the alternative, even if it was determined that Claimant was entitled to the §20(a) presumption, the evidence in the record rebuts the presumption. Further, in weighing the

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<sup>6</sup> While common sense might reflect that back pain can be felt while performing many daily activities of life, such as walking across a room, sitting in a chair, climbing a ladder, etc., such is not sufficient to establish the "working conditions" element of a compensation claim. In the present case, even accepting that the Claimant's work duties were as she described, such does not automatically mean that the work conditions could have caused a back problem or aggravated a pre-existing back problem.

evidence as a whole, Claimant fails to establish that her working conditions caused her back pain.

Once the presumption is invoked, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence which establishes that the claimant's employment did not cause, contribute to or aggravate his condition. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989); *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. *E & L Transport Co., v. N.L.R.B.*, 85 F.3d 1258 (7th Cir. 1996).

Claimant's emergency room records dated September 20, 2004, are sufficient evidence to sever the connection between the Claimant's back pain and her working conditions. These emergency room records evidence the fact that the pain she complained of on that date had been pre-existing and not caused by work. The records state specifically that Claimant indicated that she suffered from this back pain for the preceding months in which she was not working for Employer. Thus, had Claimant been entitled to the presumption, it would be rebutted, and the evidence would be weighed as a whole.

Once the presumption of causation has been successfully rebutted, "the presumption no longer controls and the issue of causation must be resolved based on the evidence as a whole." *Devine v. Atlantic Container Lines, G.I.E.*, 25 BRBS 16, 20-21 (1990).

In weighing the evidence, Claimant has not shown by a preponderance of the evidence that her back pain is causally related to his employment with Employer. Contrary to Claimant's assertion, Claimant's testimony is not credible. Claimant's own testimony regarding the onset of the pain was inconsistent as she cited two separate occurrences of when she felt the initial back pain. (TR. at 20, 41).

Regardless of where precisely Claimant alleges she initially felt her back pain, either instance is clearly contradictory with the history Claimant apparently provided the emergency room physician on September 20, 2004, as discussed above. As discussed above, the emergency room records indicate that Claimant complained of intermittent back pain that had started two months earlier. (EX 4). Nonetheless, Claimant testified that she informed the emergency room doctor that she had been lifting tiles at work that day. (TR. at 32). However, any recordation of this is missing from the emergency room records, and given the vast inconsistency in Claimant's testimony, I find her recollection is entitled to no weight. This finding is especially supported in light of Claimant's own testimony that she did not "realize" it was her work that "caused" her back pain until October 4. (TR. at 31). It makes no sense that Claimant informed the emergency room physician that her back pain was work-related when she herself did not realize this alleged casual connection until two weeks later.

Claimant's testimony regarding her previous back pain is also not credible. Claimant testified that her back pain had ended on July 31, 2004. (TR. at 47). This contradicts Dr. Doss's records from that date, which indicate that Claimant was still suffering from extreme back pain as of July 31, 2004, and that it had not been eased by her current regiment of pain medication. (EX 7-6). In response to Claimant's seemingly persistent back pain, though Dr. Doss permitted

Claimant to return to work, he switched her pain medication to help ease her “chronic back pain” that she continued to suffer. (EX 7-6). Claimant’s credibility is again diminished by the fact she answered “no” when asked in the clinic of whether she had suffered previous back pain. This denial is plainly contradicted both by Claimant’s own statements and her medical records.

It is also suspicious that Claimant continued to work the rest of the day, despite her back pain. It is also doubtful that Claimant carried the high grade pain killer, Vicoden, with her, despite her assertion that she had been virtually pain free, with the exception of sporadic migraine headaches. Finally, there is no record that indicates Claimant reported her injuries until October 4, 2004 to Mr. Davis. Though Claimant has asserted that she informed the “make-up” supervisor of her pain on the following day, there is no record of this. Also, Claimant’s own testimony indicates that she did not link her pain to her employment until October 4, further casting doubt on whether she reported her injuries, and on whether the working conditions caused her injuries. (TR. at 31).

The facts of this case make clear that Claimant has suffered from a history of intermittent back pain. As the only evidence of Claimant’s employment causing her back pain is Claimant’s implausible testimony, I find that Claimant has failed to establish by a preponderance of the evidence that her employment caused her back pain. As such, had Claimant been entitled to the Section 20(a) presumption, a review of the record as a whole reveals that Claimant has not established by a preponderance of the evidence that her back pain is work related.

### **Order**

Accordingly, it is hereby ordered that Claimant's request for compensation under the Act is DENIED.

**A**

RICHARD E. HUDDLESTON  
Administrative Law Judge